UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ANDREW MITCHELL	:	DOCKET NO. 4:14CV833
	:	
VS.	:	SHERMAN, TEXAS
	:	JULY 9, 2020
CIT BANK, NA, ET AL	:	3:30 P.M.

TELEPHONE CONFERENCE
BEFORE THE HONORABLE AMOS L. MAZZANT,
UNITED STATES DISTRICT JUDGE

APPEARANCES (BY TELEPHONE):

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PROCEEDINGS REPORTED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION.

THE COURT: Good afternoon. This is Judge Mazzant and we're here in Case 4:14CV833, Andrew Mitchell versus CIT Bank.

You've already made your appearances. Again, you all know the drill. Just identify yourself every time you speak.

And I set this for a hearing primarily to figure out the best procedure for us to tee up the issue of whether the privilege should apply or not, which involves us having to get the various federal agencies involved. The rules allow them to have a say in the matter before the Court orders any kind of production.

So let me ask the Relator, from their viewpoint, what is the best way to tee this up?

I have the various letters from the agencies. I don't believe any claim has been made to the agencies directly, but I'm also just trying to figure out what is the easiest path to -- for us to address this issue?

MR. BRAGALONE: Thank you, Your Honor. Yes, I'll address that. This is Jeff Bragalone representing Relator.

Relator is asking for specifically the procedure that Judge Fitzwater adopted in the Marketing Investors Corporation versus New Millennium Bank case, which is a case we cited to the Court. Specifically, we would ask for three things.

First, we would ask the Court to order Defendants to actually provide copies of the withheld documents to the respective agencies.

Second, we ask the Court to set a deadline for the agencies to file a motion for protective order or otherwise intervene in this action, to the extent they decide to assert the bank examiner privilege as to any of the withheld documents.

And finally, we ask that the Court order the Defendants to disclose to Relator any supplemental privilege logs or other correspondence with these agencies or communications that relate to the bank examiner privilege but to date has not been provided to Relator.

So in the Marketing Investors Corporation case, Judge Fitzwater said, and I quote -- the order that was adopted there says, quote, in order to allow the FDIC a proper opportunity to assert and defend its bank examination privilege, Defendant must first identify all documents responsive to the discovery requests issued in its possession, custody or control that it contends may be subject to the FDIC's bank examination privilege.

It then must make those documents available to the FDIC to allow it to determine whether the bank examination privilege is applicable, and/or whether it intends to assert its privilege as to each of those documents. And that's the

quotation from that case.

Now, Relator assumed that when Defendants finally sent notice to these agencies in late June that they also sent to the agencies copies of the documents that they were withholding. But the agency letters, which we have just received, note that Defendants haven't even provided copies of the withheld documents to the agencies. Instead, the agencies apparently received only the same log of documents, the same logs that Relator provided to the Court attached to its July 2nd letter, where every document is generically listed with a boilerplate claim that it is, quote, subject to the bank examiner's privilege.

In fact, the Consumer Financial Protection Bureau in its letter yesterday, which was attached to Mr. Leslie's letter to the Court this morning -- it's Exhibit C -- they say, quote -- they ask Mr. Leslie to promptly provide the Bureau with all records identified for possible production. And they go on to request that Mr. Leslie -- they say, quote, in order to facilitate the Bureau's timely involvement in this matter, the Bureau asks that you immediately provide all identified records by FTT protocol or another electronic production method.

Similarly, Exhibit B to Mr. Leslie's letter this morning is a letter from the Federal Reserve Board. The Federal Reserve Board says, quote, the Board, a non-party to

this case, is not currently in the position to determine the application of the privilege without having access to the documents at issue.

So after Relator raised this issue with the Court back in March and again at the May 28th hearing, we're very surprised that Defendants once again haven't actually given copies of the withheld documents to the agencies on whose behalf they're purporting to assert the privilege.

This tactic obviously delays resolution of the issue and the eventual production of the documents. And, unfortunately, we've seen this playbook before from Defendants. This is what they did back in March. They logged several documents that they withheld from discovery. We had a hearing on March 17th. The Court ordered that the agencies had two weeks to make a decision as to whether they were going to assert the privilege.

So after the Court did that and the agency actually got a look at what Defendants had withheld from discovery under the bank examiner privilege, the agency in that case was unwilling to support the assertion of the bank examiner privilege on even a single one of the documents that Defendants withheld from discovery. And when Relator actually received copies of those documents, we could see why.

Now, to be clear, Relator believes that the bank

examiner privilege here must take a back seat when compared to the public policy concerns invoked by the FCA, and this is consistent with Your Honor's order in the Ocwen case on this very issue where the Court noted that this is a discretionary privilege and the resolution of this depends upon ad hoc considerations of competing policy claims, and in that case the Court said, quote, the privilege should not apply to highly relevant documents in an FCA case.

But I will tell Your Honor as an officer of this Court, I have a responsibility, I think, to advocate for a fair procedure, and I know that's what the Court wants as well. And I don't believe the agencies are in a position to respond or to make their arguments if the Defendants don't actually provide them with the documents.

This is consistent with the approach that Judge Fitzwater adopted in the Marketing Investors case. And importantly, the agencies also demonstrate that they recognize the Court's authority in this instance and the authority of this Court to control discovery in the case before it.

For example, the OCC letter which was submitted as part of the July 3rd letter from the Defendants, they say that federal law prohibits disclosure of non-public OCC information absent either, one, written permission from the OCC, or two, a federal court order in a proceeding in which

the OCC has had an opportunity to appear and oppose discovery.

Similarly, the Consumer Financial Protection Bureau in its letter, which was attached as Exhibit C to Mr. Leslie's letter this morning, they say, quote, CIP Bank is prohibited from disclosing such records without prior Bureau approval, unless such disclosure is required by a court order.

And I don't want to get into all the 2(e) arguments, but I will tell you that many courts have rejected this argument and have said that the Federal Rules of Civil Procedure cannot be trumped by departmental regulations that place arbitrary limits on a court's discovery powers.

So we know that production is already required by at least two orders of the Court, the Court's initial discovery order and also the Court's April 28th, 2020 order. And Defendants can't downplay the significance of this like they tried to do in March because we know from the logs that we're talking about over 3700 documents.

Nor is relevance here disputed. In fact, the Federal Reserve Board in its letter notes that the bank has identified documents that are relevant but that contain non-public OCC information.

Also, Defendants relied on these very investigations as part of their motion to dismiss, so now they're trying to use the bank examination privilege as a shield at the same

time that they're also using it as a sword. But, Judge, that's not a shield that belongs to Defendants to wield in the first place.

So we've also learned from multiple agencies' letters that just came in that there were supplemental privilege logs that were sent on July 1st. Both the FDIC letter, which is Exhibit A, and the Federal Reserve Board letter, which is Exhibit B to Mr. Leslie's letter this morning, note that there was a July 1st letter with the updated privilege log.

Now, I'm happy to be corrected, but I don't believe we have been provided with that. Also, there are references to other communications with these agencies about the bank examiner privilege, and we would ask that the Court order that those be provided to us as well.

Finally, there's a suggestion by Defendants that Relator, because we attempted to negotiate a deadline in the amended schedule for resolution of this issue, that we are somehow fine with the long delays that have been associated here, but that's definitely not the case.

At no time did we ever suggest that it was acceptable that Defendants delayed identifying this issue for five months. The documents should have been identified by Defendants at the outset of discovery, and Relator would have actually brought this to the Court sooner except we

didn't learn of it until late May, and at that time, as the Court may recall from the hearing on May 28th, Defendants were refusing to identify the government agencies involved. They refused to say whether they had already provided the agencies with the documents.

So in conclusion, we would ask that Defendants be ordered to provide the underlying documents to the agencies immediately, just as the agencies have requested. They actually requested it be sent by FTP protocol. That's how urgently they've asked for this. And we would ask that be done by this Monday, July 13th.

Then, in addition to that, the agencies have requested copies of the Court's agreed protective orders. Those should be provided as well. There's no reason they should have been withheld so far.

Then we ask that the Court set a deadline which would be at least two weeks from the agency's receipt of the underlying documents for the agencies to appear and either intervene or otherwise file a motion for protective order to raise these issues before the Court.

I want to emphasize that contrary to Mr. Leslie's letter, we are not ignoring the agencies' interest. Rather, we believe there should be a streamlined procedure, because we don't want this issue to delay production of all these documents. We want to know that all the documents have been

produced. Nor should we be required to engage in some sort of piecemeal negotiation with the agencies to get documents that are in Defendant's possession.

Thank you, Your Honor.

THE COURT: Thank you. Response?

MR. SUSHON: Your Honor, it's Bill Sushon from O'Melveny & Myers for the Defendants.

What I haven't heard from Mr. Bragalone, Your Honor, is any reason why there should be a departure from the regulations that ordinarily cover requests for discovery from the regulators.

As Your Honor is aware, these regulations exist. They're there to protect the regulator's interests in their examinations and their deliberative processes, and these processes are followed routinely in courts throughout the country, have been endorsed by the Supreme Court of the United States. And what we haven't heard is any reason why they are not adequate here.

What we have told regulators all along, Your Honor, is that they should be complying with the procedures that are set forth in the Regulations, and what every single one of the regulators said in the letters that we submitted to the Court, Your Honor, is that it's incumbent on the Relator, as the party that is seeking this discovery, to issue a request to each of the regulators and to pursue the discovery.

And to help the regulators do that, the Relator is supposed to -- and now I'm quoting from the Federal Reserve Board's letter. It is supposed to, quote, identify the CSI sought, the relationship of the information to the issues in the litigation, the requester's need for the information, and the reason it cannot be obtained from any other source, close quote.

And that's referring to 12 CFR Section 261.22B. The other regulators have parallel requirements, Your Honor. And allowing this process to be followed appropriately here will serve the interest of judicial economy and narrow the issues that are in dispute, and it will ensure that the Court is only required to rule on any documents where there is a true dispute as to whether the privilege should yield to any competing interests.

Now, we've heard Relator say a lot of things about us trying to delay their getting access to bank examiner privileged information. That's not the case, Your Honor.

The last time that the parties were before the Court there was a discussion about setting a deadline for notifying the regulators, and we did precisely that by the deadline that was discussed, which was June 22nd.

We sent letters to the regulators and sent them initial privilege logs that were designed to let them know about the number of documents and the information that we could

provide at that point in time.

We then followed up to the regulators on July 1st with copies of the very same logs that we provided to Relator in this case.

Relator has had those logs since June 26th. Relator had those logs before the regulators had them.

So we did what we were supposed to do, which was to notify the regulators, let them know that this dispute was brewing. We let them know what documents were at issue.

We have offered to make the documents available to them, and they have requested to receive copies of those documents and we're ready to do that, Your Honor. It will take a little bit of time to get that done because these documents often have information in them that is privileged as to CIT and that will have to be redacted.

Or there's information from one regulator in another regulator's privileged document, and so we'll need to redact those appropriately so that each regulator only has its own information.

But we're prepared to move forward with this, Your Honor. And there's no emergency that requires such a short schedule as the Relator has requested.

I'll note that we have submitted a motion to amend the Scheduling Order in this case, which provides for the close of discovery on -- in February of 2021. Relator hasn't had

any issue with pushing the discovery deadline out that far.

In fact, as you'll note from our motion, Relators only concern is that that may not be long enough for him to do all the work that he needs to do with the loan files that he has requested and that we've provided.

So even if it is a February 2021 discovery cutoff, that provides more than six months, Your Honor, for Relator to go through the appropriate 2(e) process that's been prescribed by the regulators, get the discovery to which he's entitled, and then use it in whatever way he deems appropriate in terms of taking depositions or further discovery.

But there's plenty of time for all that, Your Honor, and there's no reason to shortcut the regulator's procedures for getting these documents.

THE COURT: Okay. Any response?

MR. BRAGALONE: Yes, Your Honor. Mr. Bragalone, briefly.

The arguments regarding these administrative procedures are not Defendant's to make. Mr. Sushon and Defendants have literally no standing to come before the Court and argue that we must follow certain administrative procedures. Those are -- those arguments are reserved only to the agencies.

I think the Court can see what's happening here. They're -- the Defendants are again trying to delay our

access to these documents. Even the agencies recognize the authority of this Court and the authority of a court order as an alternative to proceeding through administrative channels. And we can cite the Court at the appropriate time to all of the authority that supports that.

But we would like to actually get the documents in the hands of the agencies immediately, so there should be no reason that can't happen.

And then we believe the Court should resolve the issue. There's an initial issue as to whether these administrative procedures trump the Federal Rules of Civil Procedure. Many courts have said no, that's not the case.

But then secondarily, even if the bank examiner privilege would apply, as this Court held in the Ocwen case, it must take a back seat to the considerations of the Federal False Claims Act and the issues that are also present in this case.

So we believe that the most efficient way to resolve this is in a single proceeding, allow the agencies ample time to review the documents, which we think two weeks is sufficient. But if the Court believes more is necessary, we're certainly willing to do this in whatever reasonable fashion gives the agency the proper notice.

But the arguments that Mr. Sushon made he has no standing to bring before the Court. They're not his

arguments to make. That's up to the agency. And if prior experience is a predictor here, what's likely to happen is these agencies are going to get these documents. They're going to shake their head wondering how in the world Defendants decided to identify all of these as covered by the bank examiner privilege. And I predict that the vast majority of these documents there will not even be an assertion of a privilege, because at this point there is no assertion of a privilege. That is only for the agencies to do, and the agencies obviously have to see the documents before they can decide whether they agree with the decision of CIT to withhold these documents.

So we believe that the procedure that Judge Fitzwater adopted is certainly a streamlined procedure and that's appropriate for resolving these issues in a timely fashion.

And the schedule, Your Honor, I'm not prepared to go into reasons why we have issues with the schedule, but clearly, all parties agreed that the schedule must be extended.

Our belief as Relator was that we would now have all the documents in our possession so that we could look forward to our expert analysis and to starting depositions. Now we can't currently have our experts review the documents because we know that they're incomplete.

And we'll respond appropriately to the Scheduling Order

and perhaps we can submit an agreed Scheduling Order to the Court. I'm sort of hopeful of that.

But we shouldn't use that as a reason to further postpone by six months or more our access to these documents when you have two court orders that require Defendants to produce these by now already.

THE COURT: Okay. So here's what I'm going to do is I wanted this call to kind of flesh this out, because there are two methods of approach here. I am going to go with the approach set out by the Relator as it relates to what Judge Fitzwater did.

And, Mr. Bragalone, I would ask you to prepare an order for the Court, and you can submit it to the Court. As soon as you get it to me, I'll certainly get an order entered.

And I will hear from the defense if you want to talk about -- I know Mr. Bragalone has set out some dates, so I am going to follow that procedure, but if you want to comment on the timing, go ahead and speak now about that.

MR. SUSHON: Certainly. Thank you, Your Honor. Bill Sushon from O'Melveny & Myers again.

July 13th simply is not enough time for us to redact documents if we're going to provide them to the regulators so that we can protect each regulator's privilege from the other regulators and to protect CIT's privilege from the regulators.

I think that we probably would need about two weeks to get those redactions completed, and then we would be able to send those documents to the regulators.

I do know that the regulators take the view that from there, two weeks for them to make a decision as to whether they want to intervene or seek a protective order, in their view, is not enough time.

CFTPD in its letter, which we submitted to the Court, said that it would need 60 days to make that decision. You know, I am put in an odd position of trying to, you know, advocate for the regulators when they're not present, but I do know they take the view it would take them much longer. They are not equipped to do document review the way large law firms are, and so they would need more time for that. And I think, you know, in view of CFPB's request for 60 days as a guideline, that that's their view of it and not necessarily mine.

THE COURT: Mr. Bragalone, would you like to respond on the issue of timing?

MR. BRAGALONE: Your Honor, thank you, briefly. This is Mr. Bragalone.

So my recollection is that the CFPB has been provided a log of only 127 documents. It's -- it's difficult for me to understand even a federal agency taking two months to review 127 documents.

I can't speak to the period of time that Mr. Sushon says he needs to redact the documents. I can only say that we've been asking for this since the very beginning of the year.

If -- if it can be done in a shorter period of time, we would prefer that obviously, but I do believe that a two week period or even a three week period is more than adequate to allow these agencies to respond, especially when, for example, the CFPB has literally only 127 documents to review.

THE COURT: Okay. So, Mr. Bragalone, if you can submit us an order. As soon as you get it into the Court in some kind of editable form, then I'll decide the time limits. I'll reflect on that and I'll enter the order. So how soon can you get me an order?

MR. BRAGALONE: We will get it to you this afternoon, Your Honor. And should we put in our suggested dates or --

THE COURT: You can put your suggested dates in it and then I'll decide. That's why I want it editable and I'll decide. And then if you get it to us today, I'll try to enter an order by tomorrow. Okay?

MR. BRAGALONE: Thank you very much, Your Honor.

THE COURT: Or if you don't get it to us until tomorrow, it will be Monday.

So anything else I can do for the Relator today?

MR. BRAGALONE: Not from Relator, Your Honor. Thank you.

THE COURT: What about for defense, anything else I can do for y'all?

MR. SUSHON: This is Bill Sushon. No, thank you, Your Honor.

THE COURT: Okay. Y'all have a great day. Thank you.

MR. SUSHON: Thank you.

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Jan Mason Date